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REPORT TO THE STRONG MAYOR
TRANSITION COMMITTEE

LEGAL EFFECT OF PROPOSITION F ON THE CITY OF SAN DIEGO
REDEVELOPMENT AGENCY

INTRODUCTION

On November 7, 2004, City of San Diego [City] voters passed Proposition F, which authorizes a "Strong Mayor" form of governance for a five-year trial period, beginning on January 1, 2006, and ending on December 31, 2010. To implement the Strong Mayor form of governance, Proposition F authorizes the temporary suspension of certain provisions of the City Charter with the concurrent enactment of new provisions to effect the Strong Mayor system during the five-year trial period.¹ The purpose of this report is to address the legal effect of Proposition F on the City of San Diego Redevelopment Agency.

DISCUSSION

I. Once the Strong Mayor form of Governance takes effect, the Mayor will be removed from the City's legislative body and will assume solely executive functions.

The Strong Mayor form of governance contemplates the removal of the Mayor from the Council by providing for an eight versus nine member legislative body. San Diego Charter §§ 250, 270. In accordance with San Diego Charter section 265, the Mayor will have all of the executive authority, power, and responsibilities formerly conferred upon the City Manager, including the following functions:

1. Position of chief executive officer of the City.
2. The enforcement of all laws, ordinances, and policies of the City.
3. The ability to make recommendations for measures and ordinances.
4. The right to attend all legislative meetings.
5. The right to veto actions passed by Council in open session pursuant to San Diego Charter sections 280 and 290.

¹ The new City Charter sections are 250, 255, 260, 265, 270, 275, 280, 285, 290, and 295. The inoperative City Charter sections are 12(a), 13, 16, 17, 22, 24, 25, and 27.

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6. The right to attend and be heard at closed session meetings.
7. The sole authority to appoint the City Manager, subject to Council confirmation.
8. The sole authority to direct and exercise control over the City Manager in managing those affairs of the City under the purview of the Mayor as expressly permitted by the San Diego Charter.
9. The sole authority to dismiss the City Manager without recourse.
10. The sole authority to appoint the City Auditor and Comptroller, subject to Council confirmation.
11. The authority to dismiss the City Auditor and Comptroller, subject to the right of appeal to Council.
12. The authority to appoint members of City boards, commissions, and committees, subject to express City Charter restrictions and Council confirmation.

Consequently, once the Strong Mayor form of governance takes effect on January 1, 2006, the Mayor will be removed from the City's legislative body and assume solely executive functions as the City's Chief Executive Officer [CEO].

II. Once the Strong Mayor form of government takes effect, the Mayor can no longer serve as a member of the Agency Board and the Agency Board will be composed of eight council members.

The Community Redevelopment Law [CRL] (California Health & Safety Code §§ 33000-33855) governs redevelopment activity by public agencies within the state, including charter cities such as the City of San Diego. *Redevelopment Agency v. City of Berkeley*, 80 Cal.App.3d 158, 168-69 (1978) (wherein the court held that such state laws preempt the field, and charter provisions may not conflict with them).

The CRL sets forth the creation, purpose, and operation of "the redevelopment agency" for each public agency desiring to exercise redevelopment powers within its jurisdiction. Cal. Health & Safety Code § 33101.

When the legislative body declares the need for a redevelopment agency in accordance with the CRL, the legislative body may establish itself as the redevelopment agency, or it may establish a separate redevelopment agency comprised of resident electors of the community. Cal. Health & Safety Code §§ 33003, 33110, 33200. The legislative body means "the city council, board of supervisors, or other legislative body of the community." Cal. Health & Safety Code § 33007.

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When the legislative body declares itself to be the redevelopment agency, as the City Council did pursuant to Resolution No. 147378, on May 6, 1958 (Attachment A), the legislative body becomes the governing board of the redevelopment agency (hereinafter referenced as the Agency Board). Cal. Health & Safety Code § 33200(a). All of the "rights, powers, duties, privileges and immunities," vested by the CRL in the Agency Board, except as specifically limited by the CRL, then vest in the legislative body of the community. *Id.* Consequently, while the Agency Board is currently composed of the eight council members and the Mayor, once the Strong Mayor form of governance takes effect on January 1, 2006, the Mayor will no longer be vested with the rights, powers, duties, privileges and immunities vested by the CRL. This means that the Mayor will no longer be a member of the legislative body and cannot be a member of the Agency Board. The change will occur by operation of the CRL, with or without an amendment to the Agency bylaws.

III. To the extent that the Agency bylaws conflict with the CRL once the Strong Mayor form of governance takes effect, the Agency Board should revise the by-laws.

In accordance with the CRL, the Agency Board may "make, amend, and repeal" bylaws and regulations not inconsistent with, and to carry into effect, the purposes of the CRL. Cal. Health & Safety Code § 33125(d). The Agency's first set of bylaws were adopted by the Agency Board on April 29, 1969, via Resolution No. 1 (Attachment B). Article II, section 1 designated the Chairman, Vice Chairman, and Executive Director as officers of the Agency. Article II, section 6 provided for the election of the Chairman and Vice Chairman at regular meetings from among the members of the Agency. That section also provided for the appointment of the Executive Director and included a separate clause that "[t]he members of the Agency are and shall be and act as members only so long as they are members of the City Council." Article II, section 7 of the original bylaws also provided that "[s]hould the offices of the Chairman or Vice Chairman become vacant, the Agency shall elect a successor from its membership at the next regular meeting. When the office of the Executive Director becomes vacant, the Agency shall appoint a successor as provided in section 6...." By a separate companion resolution, Resolution No. 5, dated April 29, 1969 (Attachment C), the Agency Board then designated the Mayor as the elected Chairman, the Deputy Mayor as the elected Vice Chairman, and the City Manager or his designee as the appointed Executive Director.

The Agency bylaws were amended by Resolution No. 30, on September 15, 1970, Resolution No. 121, on June 5, 1973, and most recently by Resolution No. 217, on March 3, 1975 (Attachment D). This version is still current as of the date of this writing. The most significant change for the purposes of this analysis is that the following City Offices were permanently designated as Agency Offices in Article II, section 1 of the bylaws:

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<u>City Office</u>	<u>Agency Office</u>
Mayor	Chairman
Deputy Mayor	Vice Chairman
Council Members	Board Members
City Attorney	General Counsel
City Clerk	Secretary
City Auditor	Auditor
City Treasurer	Treasurer

Additionally, the election/appointment and vacancy provisions in Article II, sections 6-7 of the original bylaws were completely excised. Once the Strong Mayor form of governance takes effect on January 1, 2006, the bylaws will be in conflict with the CRL to the extent that the Mayor and Deputy Mayor, as former members of the legislative body, were assigned permanent offices as Chairman and Vice Chairman of the Agency Board, respectively, and there are no provisions for replacement of the vacant Chairman and Vice Chairman offices.² Consequently, Article II, section 1 of the Agency bylaws should be modified to remove the references to the Mayor and Deputy Mayor as Chairman and Vice Chairman, respectively, and, if the Agency Board desires to keep the offices of the Chairman and Vice Chairman, to adopt an election/vacancy process similar to Article II, sections 6-7 of the original bylaws.

The above recommended bylaw changes should become effective on January 1, 2006, the date that the Strong Mayor form of government takes effect. Pursuant to Article IV, the Agency bylaws shall be amended only with the approval of a majority of the members of the Agency when a quorum of five members is in attendance at a regular or special meeting, which means that a minimum of five votes is required to amend the Agency bylaws.³ That section also provides that amendments to the bylaws shall not be introduced and adopted at a single meeting.

IV. Once the Strong Mayor form of governance takes effect, the City Manager's position as Executive Director will conflict with San Diego charter section 265.

² The Deputy Mayor's position, currently authorized by San Diego Charter section 25, will be removed once San Diego Charter section 265 takes effect on January 1, 2006.

³ With the recent three vacancies of the Board (consisting of the Mayor and two Council members), only six voting members of the Board remain. Under similar circumstances, our Office has opined that the number of voting offices, versus the presence of members filling the offices, determines what vote is required to pass an action requiring a majority vote of the members. Consequently, even with three vacancies, five votes are still required to pass an action requiring a majority vote of the members, assuming the offices are comprised of nine members (pre-Strong Mayor) or eight members (post-strong Mayor). See 1968 Op.City Att'y 278 (Attachment E).

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San Diego Charter section 265 provides, in relevant part, as follows: "In addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager as described in section 260(b), the Mayor shall have the following additional rights, powers, and duties: (9) Sole authority to dismiss the City Manager without recourse." Consequently, once the Strong Mayor form of governance takes effect, the City Manager will become an "at will" employee of the Mayor.

In accordance with the CRL, the Agency may select, appoint, and employ such permanent or temporary officers, agents, counsel and employees as it requires, subject only to the conditions and restrictions imposed by the legislative body on the expenditure or encumbrance of the budgetary funds appropriated to the community redevelopment agency administrative fund. Cal. Health & Safety Code § 33126(a). Pursuant to this discretionary authority, the Agency has appointed the City Manager as Executive Director to supervise the Agency's administrative functions. Article II, section 1 of the Agency bylaws provides, in relevant part, as follows: "The Executive Director or Directors shall be the City Manager and/or such other persons as may be designated by the Agency." Article II, section 4, of the Agency bylaws provides, in relevant part, as follows: "The Executive Director shall have general supervision over the administration of the business and affairs of the Agency subject to the direction of the Agency." Consequently, under the existing Agency bylaws, the City Manager is subject to the Agency Board's authority with respect to supervising the Agency's administrative functions.

The Agency may also contract with any other agency for staff services associated with or required by redevelopment, which could be performed by the staff of such agency (Cal. Health & Safety Code § 33126(b)) or utilize the services and facilities of the planning commission, the city engineer, and the departments and offices of the community (Cal. Health & Safety Code § 33128). In light of this authority under the CRL, the Agency and City entered into an operating agreement on April 10, 1975, whereby the City agreed to act as the Agency's agent with respect to land acquisition, relocation, demolition, construction and consultant services, and to provide all administrative services and staffing for the Agency [Agreement]. The Agreement was modified by a First Amendment, via Resolution No. R-278441, on July 30, 1991 (Attachment F). The amended version of the Agreement is still current as of the date of this writing. Consequently, the City Manager is currently empowered to jointly supervise the administrative services of both the City and Agency.

Once the Strong Mayor form of governance takes effect, however, the Mayor will supervise the City Manager and all City departments, including those departments providing services to the Redevelopment Agency. San Diego Charter § 265. Consequently, except as empowered by the Mayor, the City Manager will no longer have the authority to supervise the City departments providing employees and services to the Agency, and the City Manager's authority under San Diego Charter section 265 will conflict with his authority as Executive Director under the Agency bylaws. This conflict with San Diego Charter section 265 should be

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addressed before January 1, 2006, the date that the Strong Mayor form of governance takes effect.

V. Because the Executive Director's position is not a public office, the Agency has discretion to designate the Mayor as the Executive Director.

In light of the conflict between the City Manager's role under the Strong Mayor form of governance and his current role as Executive Director of the Agency, we recommend one of the following options: (1) designation of a person other than the Mayor or City Manager to act as Executive Director, (2) designation of the Mayor as the Executive Director in lieu of the City Manager, or (3) designation of the Mayor as the Chief Executive Officer (which will require an amendment to the bylaws) with supervisory authority over the City Manager as the Executive Director.⁴ The latter option was adopted by the City of Oakland when Oakland adopted its Strong Mayor form of government in 1998 (see Oakland's revised bylaws in Attachment G).

At a recent meeting of the City's Public Safety and Neighborhood Services Committee [PS&NS], a speaker asserted that the strong mayor position will be incompatible with the position of Agency Executive Director. Because there is no statute that restricts a strong mayor from assuming the office of Executive Director, we will address this issue under the common law doctrine of incompatible offices.

The common law doctrine of incompatible offices is based upon the consideration that two public offices cannot be held by one person if, due to the conflicting nature of the offices, the public interest will be detrimentally impacted. *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636 (1940). The rule and its application are summarized in the California Municipal Law Handbook, section 2.3.15 (B), as follows:

Offices are incompatible, *in the absence of statutes suggesting a contrary result*, if any significant clash of duties exists between the two offices, if the dual office holdings would be improper for reasons of public policy, or if either officer exercises a supervisory, auditory or removal power over the other.

Cal. Municipal Law Handbook, *Ethical Considerations and Conflicts of Interest* §§ 2.3.15(B)(1)(2004), citing *Rapsey*, 16 Cal. 2d. at 640-44 (emphasis added).

If the two offices are incompatible, "the mere acceptance of the second incompatible office *per se* terminates the first office as effectively as a resignation." *Rapsey*, 16 Cal. 2d. at 644.

⁴An amendment of the bylaws is not required for Options (1) or (2) because Article II, section 1 already allows an alternative designation of the Executive Director's position.

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Under the doctrine of incompatible offices, the first issue to consider is whether the two positions are public offices. Whether a position is a public office depends upon the following:

[T]he power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law--the tenure of which is not transient, occasional, or incidental--by which for a given period an individual is invested with power to perform a public function for public benefit.

Rapsey at 639.

"The incumbent of an office is clothed with some part of the sovereignty of the state to be exercised in the interests of the public and as required by law." *Bear River Sand & Gravel Corp. v. Placer*, 118 Cal. App. 2d 684, 691 (1953)(county road commissioner is a public officer); *see also Humbert v. Castro Valley County Fire Protection Dist.*, 214 Cal. App. 2d 1, 12 (1963)(fire district captain responsible for discipline and maintenance of equipment is public officer); *People v. Hulbert*, 75 Cal. App. 3d 404, 409 (1977)(deputy sheriff is a public officer).

The Strong Mayor position is a public office because authorized by statute. San Diego City Charter § 265. However, the position of Executive Director is not likely to be considered as a public office because the Executive Director's position is not required by statute. The CRL allows the agency to perform the following:

[S]elect, appoint, and employ such *permanent and temporary officers*, agents, counsel, and employees as it requires, and determine their qualifications, duties, benefits, and compensation, subject only to the conditions and restrictions imposed by the legislative body on the expenditure or encumbrance of the budgetary funds appropriated to the community redevelopment agency administrative fund.

Cal. Health & Safety Code § 33126(a) (emphasis added).

Furthermore, in lieu of designating an Executive Director to supervise the administrative functions of the Agency, the Agency could utilize the "Department of Housing or and Community Development, or any other agency, for the furnishing by the department, or agency, of any necessary staff services associated with or required by redevelopment and which could be performed by the staff of an agency." Cal. Health & Safety Code § 33126(b). Additionally, the Executive Director is not authorized by the Agency bylaws to exercise any sovereign powers independently of the Agency Board. *See, e.g.*, Article II, section 4 of the Agency Bylaws.

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We could not find any California case law on the exact issue of whether a strong mayor could hold the office of executive director of a redevelopment agency, however, the California Attorney General's [AG's] Office has considered an analogous situation pertaining to the positions of the executive director of a county housing commission and a county housing authority commissioner. In that opinion, the AG's Office opined that a county supervisor could be employed by the county housing authority commission to serve as its secretary and executive director because the secretary and executive director position was not a public office. 81 Ops. Cal. Atty. Gen. 274, 275-76 (1998). The situation is analogous because the California Housing Authorities Law [HAL], like the CRL, authorized the county to create a housing authority to carry out the state's purpose of providing low income housing and also empowered the housing authority with the discretion to hire officers "as it requires." *Id.* at 275. Consequently, we believe that the common law doctrine of incompatibility does not apply and the appointment of the (strong) Mayor as Agency Executive Director is a policy choice.

CONCLUSION

Once the Strong Mayor form of Governance takes effect, the Mayor can no longer serve as a member of the Agency Board because he or she will no longer be a member of the legislative body. The Agency Board will, therefore, be composed of eight council members.

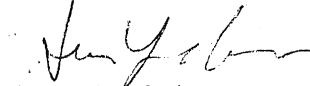
To the extent that the Agency bylaws conflict with the CRL once the Strong Mayor form of governance takes effect, the Agency Board should revise the conflicting bylaws. Our office recommends the insertion of provisions similar to those adopted in Article II, sections 6-7 of the original bylaws. The changes to the bylaws should become effective on January 1, 2006.

Furthermore, to the extent that there is a conflict arises between the City Manager's duties as subordinate to the Strong Mayor and his duties as Executive Director under Article II, sections 1 and 4 of the Agency bylaws, we recommend an alternative designation of the Executive Director or an amendment to the bylaws to allow for designation of the Mayor as CEO with supervisory authority over the City Manager as Executive Director.

Respectfully submitted,

MICHAEL J. AGUIRRE, City Attorney

By



Susan Y. Cola
Deputy City Attorney

MJA:SYC:amp
Attachments
RC-2005- 22

NOTE: Due to the number of attachments, a copy has been placed on file in the City Clerk's Office for review.